

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHERRI K. WILSON)	
Claimant)	
VS.)	
)	Docket No. 211,695
KAYLOR DENTAL LAB)	
Respondent)	
AND)	
)	
WICHITA CHAMBER WORKERS COMPENSATION)	
FUND)	
Insurance Carrier)	

ORDER

Claimant requested review of the February 26, 1997, Award entered by Administrative Law Judge Jon L. Frobish.

APPEARANCES

Claimant appeared by her attorney, Stephen L. Foulston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Edward D. Heath, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties stipulations are listed in the Award. The parties' stipulation to date of accident is corrected to read February 1996 through April 15, 1996.

ISSUES

The Administrative Law Judge entered an award for permanent partial disability benefits based upon a 12 percent impairment of function. Claimant appealed the Award and seeks review of the Administrative Law Judge's findings and conclusions concerning the nature and extent of claimant's disability. That is the sole issue now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire file, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified to find claimant entitled to an award of permanent partial disability benefits based upon work disability for the period of April 16, 1996 through January 27, 1997. Thereafter, claimant's permanent partial disability award should be limited to her percentage of functional impairment. The findings and conclusions of the Administrative Law Judge are otherwise affirmed.

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of her employment with respondent by a series of accidents beginning February 1996 and continuing until her last day of work on April 15, 1996. The 12 percent functional impairment rating given claimant by Ernest R. Schlachter, M.D., for her bilateral carpal tunnel syndrome condition is uncontradicted. Dr. Schlachter's 53.3 percent tasks loss opinion is, likewise, uncontradicted in the record. In workers compensation proceedings, the fact finder cannot ignore uncontradicted evidence unless it is improbable, unreasonable, or untrustworthy. Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978). In this case, the opinion testimony of Dr. Schlachter is consistent with his findings upon physical examination of claimant and claimant's subjective complaints. Therefore, Dr. Schlachter's opinions as to claimant's percentage of functional impairment and percentage loss of tasks performing ability are accepted by the Appeals Board as fact.

The Administrative Law Judge limited claimant's permanent partial disability award to her 12 percent functional impairment because claimant was offered an accommodated position by her former employer and she did not attempt to perform that job. Such a determination by the Administrative Law Judge is consistent with the public policy consideration announced by the Kansas Court of Appeals in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995). However, claimant was not offered an accommodated job within her restrictions until January 27, 1997. Claimant argues, and the Appeals Board agrees, that claimant should not be limited to a functional award for the period of April 16, 1996 through January 27, 1997, when she was either unemployed or not earning 90 percent or more of the average gross weekly wage that she was earning at the time of her injury.

Because hers is an unscheduled injury, claimant's right to permanent partial disability is governed by K.S.A. 1996 Supp. 44-510e(a) which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

At the time claimant quit her employment with respondent, she was performing an accommodated job which required her to drive approximately 270 miles a day in a vehicle which did not have power steering or an automatic transmission. Dr. Schlachter opined that claimant should not do that type of work "Because that's too hard on her hands to have to shift gears and to turn the wheel." Although the accommodated job respondent offered to claimant on January 27, 1997, likewise, involved driving, respondent was willing to provide a vehicle that would have both power steering and an automatic transmission. Accordingly, the Appeals Board finds that the accommodated job offer was most likely within claimant's medical restrictions and that she should have at least attempted to perform that work. The record makes clear that the job offered would have paid claimant the same wage she was earning at the time of her injury. In Foulk, the court held that:

"Construing K.S.A. 1988 Supp 44-510e(a) to allow a worker to avoid the presumption of no work disability by virtue of the worker's refusal to engage in work at a comparable wage would be unreasonable where the proffered job is within the worker's ability and the worker had refused to even attempt the job. The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system." 20 Kan App. 2d 277, Syl. ¶4.

Therefore, based upon the public policy enunciated by the Kansas Court of Appeals in Foulk, the Appeals Board will impute the wage claimant would have earned had she accepted the accommodated job offered by respondent. Although the Court of Appeals in Foulk applied an earlier version of K.S.A. 44-510e, the Appeals Board has previously

held that the public policy espoused in Foulk applies to accidents arising under the 1993 amendments to the Workers Compensation Act, where a claimant "has refused employment which the claimant has the ability to perform or voluntarily removes himself from the labor market without good reason." Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (September 26, 1995).

Claimant's stipulated average weekly wage is \$284.41. Following her April 15, 1996, termination of employment with respondent, claimant testified she worked for approximately two months, from about September 26, 1996 until about November 18, 1996, for Craftsman, Inc. at \$5 per hour for 16 to 20 hours a week. Accordingly, the Board finds claimant averaged \$90 per week for the 7.71 week period she was employed by Craftsman, Inc. Comparing the \$90 per week with claimant's average weekly wage of \$284.41 results in a wage loss of 68.4 percent. Averaging this wage loss percentage with the 53.3 percent tasks loss opinion given by Dr. Schlachter results in a work disability of approximately 61 percent. For the remaining period of April 16, 1996, through January 27, 1997, claimant was unemployed and, thus, had a 100 percent wage loss. Averaging the 100 percent wage loss with the 53.3 percent tasks loss gives a work disability of approximately 77 percent for the remaining 33 weeks. Thereafter, claimant would be limited to an award of permanent partial disability compensation based upon her percentage of functional impairment only.

This modification from the functional disability award to an award of work disability followed by an award based upon the percentage of functional impairment actually results in no change in the total benefits claimant will receive. In this respect, it is a distinction without a difference and the Board could have left the Administrative Law Judge's award alone. Nevertheless, for the sake of clarity, and because of the specific request by claimant, the Board has modified the award to reflect the change of circumstances pertaining to claimant's entitlement to work disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish, dated February 26, 1997, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sherri K. Wilson, and against the respondent, Kaylor Dental Lab, and its insurance carrier, Wichita Chamber Workers Compensation Fund, for a series of injuries occurring through April 15, 1996 and based upon an average weekly wage of \$284.41 for 3.57 weeks of temporary total disability compensation at the rate of \$189.62 per week, or \$676.94. For the period from May 11, 1996 through September 25, 1996, claimant is entitled to 19.71 weeks of permanent partial general disability benefits at the rate of \$189.62 per week, or

\$3,737.41 for a 77% work disability. For the period from September 26, 1996 through November 18, 1996, claimant is entitled to 7.71 weeks of permanent partial general disability benefits at the rate of \$189.62 per week, or \$1,461.97 for a 61% work disability. For the period beginning November 19, 1996 through January 17, 1997, claimant is entitled to 10 weeks of permanent partial general disability benefits at the rate of \$189.62 per week, or \$1,896.20, for a 77% work disability. For the period commencing January 18, 1997, claimant is entitled to 12.38 weeks of permanent partial general disability benefits at the rate of \$189.62, or \$2,347.50, for a 12% functional disability, making a total award of \$10,120.02.

As of July 18, 1997, there is due and owing claimant 3.57 weeks of temporary total disability compensation at the rate of \$189.62 per week, or \$676.94, followed by 49.8 weeks of permanent partial general disability benefits at the rate of \$189.62 per week, or \$9,443.08, making a total award of \$10,120.02 which is due and payable in one lump sum less any amounts previously paid.

All other findings, conclusions and orders by the Administrative Law Judge are hereby adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven L. Foulston, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director